

(2) Recusal of Chairman Kennard Because of a Prospective Violation of 18 U.S.C. 201

The recusal of Chairman Kennard is required in order that he not be at risk for violation of 18 U.S.C. 201. Violation of this provision has both ethical and criminal implications. It operates independent of 5 U.S.C. 553, 556, and 557.

18 U.S.C. 201 (b)(2)(A) states in pertinent part that a person selected to be a public official may not, directly or indirectly, corruptly accept, receive, or agree to receive anything of value for himself personally, in return for being influenced in his performance of any official act.

In the case of Mr. Kennard, in order for Senator Helms to release the hold on his nomination to be Chairman and thus to be confirmed, which is the receipt of something of value to Mr. Kennard, he was influenced to act in the performance of his official duties by agreeing to place in the NPR the consideration of comparative hearings and comparative criteria, even though the FCC had previously determined that such hearings and criteria could not legally be adopted, and he apparently agreed to cause such rules to be adopted in the NPR that would give preferential treatment or favor the grant of the application of Orion.

The provisions of 18 U.S.C. 201 are to be given a "broad and liberal construction." Parks v. U.S., 355 F.2d 167, 168 (5th Cir. 1965); Wilson v. U.S., 230 F.2d 521, 524 (4th Cir. 1956). A thing of value is to be given a subjective focus as to the value attached to it by the recipient public official and it is to be given a broad meaning. U.S. v. Williams, 705 F.2d 603, 623 (2nd Cir.

1983).

A thing of value received by a public official can be employment, or promises related to employment. U.S. v. Gorman, 807 F.2d 1299, 1304-1305 (6th Cir. 1986). A thing of value received by a public official can be an agreement as to a political action. U.S. v. Girard, 601 F.2d 69, 71 (2nd Cir. 1979).

The performance of official duties, in which a public official is influenced to act because of the receipt of something of value, can be expediting an application before a government agency, setting a hearing date, or giving any special favors or preferential treatment. U.S. v. Pommerening, 500 U.S. 92, 97 (10th Cir. 1974); U.S. v. Irwin, 354 U.S. 192, 196 (2nd Cir. 1965).

It is immaterial whether the official action that is sought to be influenced is right or wrong as a matter of policy, or that the official action would have occurred in any event. U.S. v. Miller, 340 F.2d 421, 424 (4th Cir. 1965); U.S. v. Labovitz, 251 F.2d 393, 394 (3rd Cir. 1958); U.S. v. Jannotti, 673 F.2d 578, 601 (3rd Cir. 1982).

An intention to influence the official action of a public official, accompanied by the corrupt giving or accepting of something of value to which he is not lawfully entitled, are the essential elements of a violation of 18 U.S.C. 201. U.S. v. Barash, 365 F.2d 395, 401 (2nd Cir. 1966); U.S. v. Evans, 572 F.2d 455, 480 (5th Cir. 1978).

The term "corrupt" is not defined in 18 U.S.C. 201 and is to be given its ordinary meaning. U.S. v. Pommerening, 500 F.2d at 97. Even if corruption is not intended, there is still a tendency

to provide conscious or unconscious preferential treatment. U.S. v. Evans, 572 F.2d at 480.

The fact that a member of Congress is a party to violation of 18 U.S.C. 201, or that the violation occurs in the chambers or on the floor of Congress, does not provide immunity to the violators under the U.S. Constitution, pursuant to Article One, Section Six, Clause One. U.S. v. Johnson, 215 F.Supp. 300, 305-307 (D. Md. 1963).

The purpose of 18 U.S.C. 201 is to prevent the seeking of an advantage by giving something of value to a public official (or to person selected to be a public official), that he is not legally entitled, in order to influence him, or to "cloud his judgment," in carrying out his official duties. It is a concern of society that it have the benefit of objective evaluation and unbiased judgment on the part of those who make official decisions and that the will of an interested person not be substituted for the judgment of a public official as the controlling factor in an official decision. U.S. v. Jacobs, 431 F.2d 754, 759 (2nd Cir. 1970); U.S. v. Evans, 572 F.2d at 480.

(3) Recusal of Chairman Kennard to Prevent the Appearance of Impropriety

Regardless of a prospective violation of 18 U.S.C. 201, Chairman Kennard should nevertheless recuse himself from the NPR with respect to the adoption of rules which would affect the application of Orion or the Biltmore Forest adjudicative proceeding. If any rules are adopted that unfairly favor the application of Orion, or give it preferential treatment, the

appearance of impropriety would be created.

On the other hand, if any rules are adopted in the NPR that are objectionable to Senator Helms because they do not provide preferential treatment for Orion as demanded by him, then Chairman Kennard would be at risk for political retaliation or retribution from Senator Helms and his ally, Senator Faircloth. Accordingly, Chairman Kennard should recuse himself from the NPR.

(4) Recusal of Commissioners Powell, Tristani, and Furchtgott-Roth

The intense political pressure and coercion that Senator Helms applied to Chairman Kennard, in order to obtain his agreement (albeit grudgingly) to use comparative hearings in the Biltmore Forest proceeding, instead of an auction, and to adopt a comparative criteria that would benefit or cause the grant of Orion's application, raises a presumption that Senator Helms applied similar political pressure and coercion to Commissioners Michael Powell, Gloria Tristani, and Harold Furchtgott-Roth.

These three new Commissioners were confirmed by the U.S. Senate at the same time as Chairman Kennard and thus would have been exposed to the same political pressures and coercion by Senator Helms. According to press reports, President Clinton sent their nominations to the Senate as part of a "package deal" with Mr. Kennard because of the anticipated opposition of Senator Helms to him due to the Orion case. See, Wall Street Journal, July 28, 1997.

Accordingly, Commissioners Powell, Tristani, and Furchtgott-Roth should disclose on the record what contacts, if any, they or their staff members have had, either before or after confirmation,

with Senators Helms or Faircloth, with any other members of Congress, with Congressional staff members, with representatives of Orion, or with any other persons, as to merits of the Orion application and/or as to the merits of using comparative hearings or auctions in the Biltmore Forest adjudicative proceeding. See, NPR, para. 104, p. 45; Home Box Office, Inc. v. FCC, 567 F.2d at 52, where because of the appearance of ex parte contacts, the FCC was directed to provide a list of all such presentations made to any of its members or representatives with respect to the rulemaking in question.

During the confirmation process for Chairman Kennard and the new Commissioners, Senators Helms and Faircloth threatened to pursue the adoption of legislation to nullify any FCC action using auctions in the Biltmore Forest adjudicative proceeding, or which did not provide for the grant of Orion's application. See, Congressional Record, p. S11310; Asheville Citizens-Times, October 8, 1997.

Therefore, Commissioners Powell, Tristani, and Furchtgott-Roth should also disclose on the record what political influence or pressure, if any, they or their staff members have received or been exposed to, either before or after confirmation, from Senators Helms or Faircloth, from any other members of Congress, from Congressional staff members, from representatives of Orion, or from any other persons, with respect to the grant of the application of Orion and/or to the adoption of the use of comparative hearings in the Biltmore Forest adjudicative proceeding.

The Commissioners, moreover, should state on the record

whether they perceive any threat of retaliation to the FCC, or to themselves politically, from Senators Helms or Faircloth, if comparative hearings are not used in the Biltmore Forest adjudicative proceeding, or if the Orion application is not granted, as they have demanded. The Commissioners should also state on the record whether these, or any other, threats from Senators Helms or Faircloth would influence their decision in the NPR as to the use of comparative hearings, or auctions, in the Biltmore Forest adjudicative proceeding, or in deciding the merits of the Orion application. See, NPR, para. 104, p. 45; Home Box Office, Inc. v. FCC, 57 F.2d at 52.

Based upon their responses, the Commissioners should determine whether they must recuse themselves from participation in the NPR with respect to the adoption of any rules affecting the application of Orion and the Biltmore Forest adjudicative proceeding because of political interference or influence by Senator Helms, or other members of Congress. See, 5 U.S.C. 556 (b); Jenkins v. Sterlacci, 849 F.2d 627, 630-631 (D.C. Cir. 1988), the decisionmaker must in the first instance decide whether to recuse himself if his impartiality might reasonably be questioned.

(5) Recusal of Commissioner Ness Because of her Comments as to the Merits of Orion's Application

Commissioner Susan Ness has recently made public comments as to the merits of Orion's application in the context of use of comparative hearings, rather than use of an auction. According to a quote in MediaWeek, January 5, 1998, p. 19, Commissioner Ness "is concerned that auctions, while quick and efficient, ignore the

equities that already exist in some of these outstanding radio license cases, including Lee's [Orion]."

The comments by Commissioner Ness indicate that she has been presented and has considered non-record evidence as to the merits of Orion's application in the context of use of comparative hearings, rather than use of an auction. These matters are in the nature of specific adjudicative facts, and not general legislative facts, because they relate to a particular party. Association of Nat. Advertisers, Inc. v. FTC, 627 F.2d at 1161-1162, n. 20, 1172, n. 52, 1175, and 1184-1185. Thus, Commissioner Ness should fully disclose any ex parte contacts that she has had as to the merits of Orion's application and the use of comparative hearings. See, NPR, para. 104, p. 45; Home Box Office, Inc. v. FCC, 567 F.2d at 52. 2/

Commissioner Ness should then determine whether to recuse herself from the NPR in order to prevent the appearance that she has prejudged the merits of the proceeding in favor of Orion, or to prevent the appearance of any impropriety. See, 5 U.S.C. 556 (b); Jenkins v. Sterlucci, 849 F.2d at 630-631.

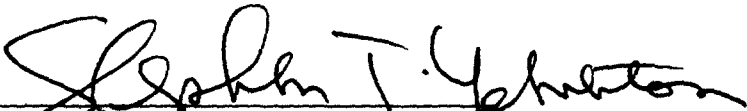
2/ Where an agency justifies its actions by reference only to information in its public file, while failing to disclose other relevant information that has been presented to it, a reviewing court cannot presume that the agency acted properly. It must therefore treat the agency's justifications as a fictional account and must perforce find those actions arbitrary. Home Box Office, Inc. v. FCC, 567 F.2d at 54-55.

Conclusions

WHEREFORE, in view of the foregoing, it is requested that the Commissioners of the FCC who are unable to render an impartial, objective, and fair decision in the NPR, that is not the result of external political interference or influence, or improper ex parte contacts, with respect to the pending application of Orion, determine whether to recuse themselves from the rulemaking proceeding.

Respectfully submitted,

WILLSYR COMMUNICATIONS,
LIMITED PARTNERSHIP

By: 
Stephen T. Yelverton, Esq.
1225 New York Ave., N.W., Suite 1250
Washington, D.C. 20005
Tel. 202-276-2351

February 25, 1998

DECLARATION

I, Sharan A. Harrison, hereby declare, under penalty of perjury, as follows:

That, I am the General Partner of Willsyr Communications, Limited Partnership, which is an applicant before the Federal Communications Commission ("FCC") for a construction permit for a new FM broadcast station in Biltmore Forest, North Carolina, in MM Docket No. 88-577.

That, Willsyr filed comments and reply comments before the FCC in Notice of Proposed Rulemaking ("NPR"), in MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264, rel. November 26, 1997.

That, the NPR is considering the adoption of rules which would govern the selection of the permanent licensee in the Biltmore Forest proceeding, which has been pending since 1987.

That, Willsyr requests Chairman William Kennard to recuse himself from participation in the NPR with respect to the adoption of rules which would govern the selection of the permanent licensee in the Biltmore Forest proceeding.

That, this request for recusal is based upon information obtained from the Congressional Record, October 29, 1997, pp. S11308-11310, and related materials, including numerous press reports, which indicate that U.S. Senator Jesse Helms (R-NC) placed a hold on the nomination of Mr. Kennard to be Chairman of the FCC for the express purpose of obtaining an agreement from him to take official action at the FCC to assist and to facilitate the grant of the application of Orion Communications Limited ("Orion") for

construction permit for the Biltmore Forest FM station in NM Docket No. 88-577. The official action by Chairman Kennard, which was demanded by Senator Helms to release the hold on his nomination, included placing in the NPR a request for comments as to whether the FCC should decide the Biltmore Forest proceeding on the basis of a frozen 10-year old record and comparative hearings, instead of auctions.

That, it appears that Senator Helms, as consideration for the release of the hold on the nomination, further expects Mr. Kennard to act in his official capacity as Chairman to adopt rules in the NPR which would give preferential treatment to the application of Orion and which would result in its grant of the Biltmore Forest license.

That, in order to prevent political interference, or the appearance of any impropriety, in adopting rules in the NPR, which would ultimately resolve the Biltmore Forest proceeding, Chairman Kennard should recuse himself from the NPR. He has already recused himself from the Biltmore Forest proceeding because of Senator Helms' intervention and political pressure on behalf of Orion.

That, such recusal by Mr. Kennard would also prevent a violation of 18 U.S.C. 201 which prohibits a public official, or person selected to be a public official, from receiving anything of value in which he is not legally entitled, in return for giving preferential treatment, or special favors, in the performance of his official duties.


That, in view of the intense political pressure that Senator

Helms applied to Mr. Kennard in order to obtain preferential treatment for Orion by the FCC and to obtain its grant, Willesyr moreover requests that Commissioners Michael Powell, Gloria Tristani, and Harold Furchtgott-Roth disclose whether they received any solicitations from Senator Helms, or any one else, or ex parte contacts with respect to the grant of the application of Orion, or to give it preferential treatment in the NPR. If so, they should determine whether to recuse themselves from the NPR.

That, in MediaWeek, January 5, 1998, p. 19, Commissioner Susan Ness is quoted as "concerned that auctions, while quick and efficient, ignore the equities that already exist in some of the outstanding radio license cases, including Lee's [Orion]. Accordingly, Commissioner Ness should disclose all the ex parte contacts and political solicitations that she has had with respect to the application of Orion, and then determine whether to recuse herself from the NPR.

I, hereby declare that the foregoing is true and correct to the best of my knowledge and belief, and that Willesyr's motion to recuse is filed in good faith and not for the purpose of delay.

This the 25th day of February, 1998.


Sharan A. Harrison,
General Partner
Willess Communications,
Limited Partnership

United States Senate

WASHINGTON, DC 20510-3308

October 22, 1996

The Honorable Reed E. Hundt
Chairman, The Federal Communications
Commission
1919 M Street, N.W.
Washington, D.C. 20554

VIA FACSIMILE

Dear Mr. Hundt:

We are extremely troubled by the FCC's decision yesterday to revoke the operating license for WZLS.

After the plight of WZLS was reported in the Asheville Citizen Times, we wrote to you and stated that we thought it was wrong for any citizen, particularly one who has been in the radio business since 1947, to be put through this kind of process to procure a radio station license from the federal government. WZLS is a family owned station, and Mr. Zeb Lee is 84 years old.

The FCC's action yesterday is outrageous and callous, and typical of why so many Americans believe that the federal government works against them, not for them.

As you know, this process began in 1987 and took six years for WZLS to secure the license. In 1993, a court decision, unrelated to WZLS, forced open the bidding process again. Now, three years later, the FCC has decided to take WZLS off the air. This decision is more troubling in light of the fact that the present owners of WZLS were forced to sell their other radio station in order to obtain the new license.

This decision appears to turn on the issue of WZLS constructing a radio station, after notice of the 1993 case, however, WZLS was directed to construct a new station as part of the getting the license for the new FM station.

It is troubling that a citizen has been induced by the federal government to take a certain action, only to be told years later that he should not have relied on the government's word.

Page 2
The Honorable Reed Hundt

We are requesting that you immediately grant a stay of this decision. Further, we are asking that the FCC, as soon as possible, reconsider this decision and award a permanent license to Mr. Lee and his family.

Sincerely,


Lauch Faircloth


Jesse Halms

NOTICE OF HEARING

COMMITTEE ON ENERGY AND NATURAL
RESOURCES

Mr. MURKOWSKI. Mr. President, I would like to announce for the benefit of Members and the public that the Committee on Energy and Natural Resources has scheduled a hearing to receive testimony on S. 417, reauthorizing EPCA through 2002; S. 416, administration bill reauthorizing EPCA through 1998; and S. 186, providing priority for purchases of SPR oil for Hawaii; and the energy security of the United States. In addition to these bills the committee will also consider S. 698, the Strategic Petroleum Reserve Replenishment Act.

The hearing will take place on Tuesday, May 13, 1997 at 9:30 a.m. in room SD-366 of the Dirksen Senate Office Building.

Those wishing to testify or submit written statements for the record should contact Karen Hunsicker, counsel to the committee at (202) 224-3543 or Betty Nevitt, staff assistant, at (202) 224-0765.

AUTHORITY FOR COMMITTEES TO
MEET

COMMITTEE ON ARMED SERVICES

Mr. STEVENS. Mr. President, I ask unanimous consent that the Committee on Armed Services be authorized to meet on Thursday, May 8, 1997, at 5 p.m. in executive session, to consider certain pending military nominations.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON BANKING, HOUSING, AND URBAN
AFFAIRS

Mr. STEVENS. Mr. President, I ask unanimous consent that the Committee on Banking, Housing, and Urban Affairs be authorized to meet during the session of the Senate on Thursday, May 8, 1997, to conduct a mark-up on S. 462, the Public Housing Reform and Responsibility Act of 1997.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON FOREIGN RELATIONS

Mr. STEVENS. Mr. President, I ask unanimous consent that the Committee on Foreign Relations be authorized to meet during the session of the Senate on Thursday, May 8, 1997, at 10:30 a.m. to hold a business meeting.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON GOVERNMENT AFFAIRS

Mr. STEVENS. Mr. President, I ask unanimous consent on behalf of the Governmental Affairs Committee to meet on Thursday, May 8, 1997, at 10 a.m. for a hearing on the Government's Impact on Television Programming.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON THE JUDICIARY

Mr. STEVENS. Mr. President, I ask unanimous consent that the Committee on the Judiciary be authorized to hold an executive business meeting during the session of the Senate on Thursday, May 8, 1997, at 10 a.m.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON THE JUDICIARY

Mr. STEVENS. Mr. President, I ask unanimous consent that the Committee on the Judiciary be authorized to meet during the session of the Senate on Thursday, May 8, 1997, at 2 p.m. to hold a hearing on: S. 43, Criminal Use of Guns.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON RULES AND ADMINISTRATION

Mr. STEVENS. Mr. President, I ask unanimous consent that the Committee on Rules and Administration be authorized to meet during the session of the Senate on Thursday, May 8, 1997, beginning at 9:30 a.m. to consider revisions of Title 44/GPO.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUBCOMMITTEE ON SURFACE TRANSPORTATION

Mr. STEVENS. Mr. President, I ask unanimous consent that the Subcommittee on Surface Transportation and Merchant Marine of the Senate Committee on Commerce, Science and Transportation be authorized to meet on May 8, 1997, at 10:30 a.m. on the Hazardous Materials Transportation Reauthorization.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

AMENDMENT ON WZLS RADIO
STATION

• Mr. FAIRCLOTH. Mr. President, I have agreed not to offer an amendment to the supplemental appropriations bill regarding a radio station in my State, because I am told that a point of order may be raised against it. But, Mr. President, I will continue to probe this matter further. I intend to request documents from the FCC on this issue. Further, I think that the Commerce Committee should hold a hearing to investigate the irregularities concerning this case.

Mr. President, in 1987, Zeb Lee and his family attempted to get a new FM station license in Asheville, NC. At the time, Mr. Lee had owned and operated a successful AM station in the area for 40 years.

By all accounts, Mr. Lee has been a model citizen and a model radio station operator, this is in stark contrast to a lot of what is taking place on radio today.

In 1993, a full 6 years later, Mr. Lee was awarded the station on a temporary basis, beating out 12 other applicants. Several of his competitors were found to be unqualified. In fact, one lied about his ability to operate a station. Another lied about his heritage in order to obtain a minority preference.

Pending final approval, Mr. Lee was required by the FCC to sell his AM station and to begin constructing a new

FM tower. In reliance on the Government, he did both. A week after Zeb Lee was on the air, the FCC issued a public notice freezing all licensing proceedings affected by the Bechtel versus FCC case.

In an unusual move, in 1996, the full FCC Board reversed all previous decisions and awarded temporary operating authority to the four opponents of Zeb Lee in the original application process. The four opponents were acting as a group by this time.

Mr. President, here we are, 10 years later—and Mr. Lee is still fighting his case with the FCC. He was on the air for 3 years—only to be told by the FCC that he would now be taken off the air, once his opponents could go on.

Mr. President, this is a highly unusual case. This was the only station, affected by the Bechtel case, where the initial decision was reserved. Furthermore, the FCC has never issued final regulations pursuant to the Bechtel case.

And what did the four opponents who got the radio station do with the new license—they have shopped for another buyer.

The four opponents have now turned over their temporary license to a large out of state radio company.

The fact of the matter is that the opponents in the licensing process had no intention of running a radio station. They only hope was that Zeb Lee would buy them off—in other words pay "blackmail." If that did not work—and they did win the radio station—they would transfer those rights for a big profit.

Mr. President, this process is wrong. It is deeply flawed.

Any bureaucratic process that takes 10 years, by itself is an outrage.

But the process that bankrupts an 80 year old man is truly wrong.

If he loses the station, the end result will be that a family owned radio business, located in Asheville area for 40 years, will have lost the radio license in a deeply flawed process.

His four opponents never had any intention of operating a radio station, they only wanted to flip the license to a larger company.

This is wrong, and it must stop.

Mr. President, my amendment would have provided that Zeb Lee could continue to operate his station for a period of 6 more months. This would allow the Congress to review this matter. It would allow us to get to the bottom of what the FCC is doing.

We have to make certain that this process has been fair and even handed, but quite frankly, judging from the facts, there have been serious problems with this entire issue.

Mr. President, in conclusion, I can assure all the citizens in Asheville that I will continue to pursue this matter with vigor. •

ARSON AWARENESS WEEK

• Mr. MOYNIHAN. Mr. President, as I am sure many of my colleagues are



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

June 9, 1997

The Honorable Lauch Faircloth
United States Senate
Washington, D.C. 20510-3305

Dear Senator Faircloth:

I am writing in response to your letter of May 30, 1997, in which you urged the Commission to reconsider its decision granting interim authority to Biltmore Forest Radio, Inc. (BFRI) to operate an FM station in Biltmore Forest, North Carolina. That decision required Orion Communications Limited (Orion), the former permittee of station WZLS(FM), to cease operating its station once BFRI began broadcasting under its interim authorization. I am keenly aware of the hardships posed by this decision for Orion and of the long record of local broadcast service of Orion's principal, Mr. Zebulon Lee. However, the Commission unanimously concluded that the result reached in this particular case was required by the decisions of the court of appeals and by our fundamental obligation to treat all parties to Commission proceedings in a fair and unbiased manner. Indeed, the D.C. Circuit Court of Appeals recently rejected Orion's contention that the Commission's order directing Orion to cease operating was in error and should be stayed pending further judicial consideration. I hope that a brief review of the background of this case and the basis for our decision will be helpful in understanding our conclusion.

Orion was granted a construction permit to build WZLS(FM) after it prevailed in a comparative hearing over several other applicants. The losing applicants promptly appealed the Commission's decision to the court of appeals. While that appeal was pending, the court of appeals, in the *Bechtel* decision, held unlawful the criteria utilized by the Commission in its comparative broadcast licensing proceedings, including that which had awarded Orion its permit. More specifically, the court found unlawful the Commission's longstanding policy of giving a preference in comparative hearings to owners, such as Mr. Lee, who would actually work at and manage the station. The clear and unchallenged impact of the *Bechtel* decision was to undermine the very method used by the Commission to award Orion's permit in the first instance.

Because of that decision and the pendency of the court appeal of Orion's permit grant, Orion faced a choice. It could withhold further construction efforts or it could proceed at its own risk. Orion elected to proceed with construction of its station. While our rules allow permittees to proceed in this manner, they do not require them to do so. The pendency of an appeal of a permittee's authorization justifies a delay in construction until a final decision is reached.

Importantly, Orion's construction permit, like all construction permits, explicitly notified the permittee that any construction undertaken before the award of its permit is final would be at the permittee's own risk. Indeed, Orion specifically acknowledged this risk in its letter to the Commission requesting that its construction permit be issued notwithstanding the pendency of petitions for reconsideration and a judicial appeal against the grant to Orion. Orion stated that it "understands that issuance of the construction permit will be conditioned [sic] the outcome of the pending petitions for reconsideration and appeal, and further understands that any construction undertaken by Orion before the grant of its application becomes final will be at Orion's own risk." *Letter from Counsel for Orion*, February 22, 1993. Before Orion had completed construction of its station, the court of appeals vacated the Commission's decision awarding the permit to Orion and remanded the case to the Commission in light of its decision in *Bechtel*. The clear impact of this decision was to take away Orion's authority to construct the station. Nonetheless, Orion continued and completed construction of its station and began broadcasting.

Within days of Orion commencing broadcast operations, the Commission, responding to the potentially disruptive effect of the *Bechtel* decision on stations operating pursuant to nonfinal comparative grants, issued a *Public Notice* clarifying that "[w]here program tests have already commenced, operations may be continued so as not to deprive the public of existing service." *Modification of FCC Comparative Proceedings Freeze Policy*, 9 FCC Rcd 6689, 6691 (August 4, 1994). The *Public Notice* also stated that permittees "who have commenced construction are advised that further construction is at their own risk and that, in any event, they should not incur additional obligations directed toward construction or operation." *Id.*

Initially, the Mass Media Bureau, in an effort to preserve Orion's existing service to the public, concluded that Orion could continue its operations under the terms of the *Public Notice*. The competing applicants in the Orion proceeding raised serious legal challenges to this conclusion. Specifically, BFRI contended that Orion had clear and explicit notice that its permit was no longer valid before it completed construction. As a result, Orion could not argue that it proceeded in good faith reliance on a Commission grant and should therefore be entitled to continue operating to the prejudice of the other applicants. After careful review of the filings, the Mass Media Bureau met on several occasions with all of the parties to encourage a settlement of their differences. When these efforts proved unsuccessful, Orion, consistent with the Commission's rules, was given the opportunity to participate in a joint interim operating arrangement which had been formed by the other applicants. Orion declined to do so. Thereafter, the Bureau recommended to the Commission that it grant BFRI's application for review and place its request for joint interim operating authority on public notice. The Bureau was persuaded that Orion was not entitled to continued operating authority because it, unlike the permittee in *Highlands Broadcasting Co., Inc.* and other permittees faced with a *Bechtel*-based rescission of their permits, had finished construction and commenced broadcasting *after* its authority to build had been expressly revoked by the court

of appeals. The Commission, after careful review, unanimously agreed with the Bureau's recommendation and issued the order directing the Bureau, consistent with Section 73.3592(b) of the Commission's rules, to process the competing applicants' request for joint interim operating authority. In response to a petition for reconsideration filed by Orion, the Commission, again after careful review, unanimously affirmed its prior decision.

Orion asked the court of appeals to stay the Commission's order, alleging that it was likely to succeed on the merits and would be irreparably and grievously harmed by implementation of the order. The Commission, Orion argued, had arbitrarily singled it out for different treatment from other permittees facing *Bechtel*-prompted annulment of their permits and had engaged in *post hoc* rationalization in justifying its action. In a unanimous decision by Judges Sentelle, Henderson and Ginsburg, the court disagreed that a stay was warranted and denied Orion's request. On June 2, 1997, the joint interim operating group, BFRI, commenced operating and, pursuant to a Bureau order issued on the same day, Orion ceased its broadcast operations on WZLS(FM).

Several aspects of this interim operating arrangement are particularly noteworthy. First, this arrangement is temporary and is intended to preserve service to the public while , avoiding any actual or perceived favoritism to any party by treating them all with strict equality. Permitting one of the competing applicants -- Orion or any other -- to operate the station while the other parties simply await a Commission decision would be inconsistent with this concept. The courts, in analogous situations, have repeatedly encouraged the Commission to follow this "equal treatment" approach to avoid prejudice to the rights of the applicants.

Second, Orion, even though it has declined to participate in the interim arrangement, remains fully eligible to compete for the license for this station at such time as the Commission adopts standards for deciding between competing applicants for new broadcast stations.

Third, as interim operator, BFRI is required to comply with all Commission rules and policies. Thus, although BFRI has entered into a Local Marketing Agreement (LMA) with an individual, that arrangement must comply with the Commission's rules and policies and does not, and could not, effectuate a transfer of control to another entity. Moreover, under no circumstances would BFRI be permitted to sell its interim authorization without obtaining the Commission's authority to do so. The Commission would fully consider the rights of Orion, as a remaining eligible applicant, in considering any such request.

There is no doubt that the court of appeals decision in *Bechtel*, which undid decades of Commission policy, has left Mr. Lee and many other applicants in a very unfortunate position. After *Bechtel*, the Commission worked diligently to develop new standards. The staff was ready to present to the Commission its proposal for new comparative standards when the Supreme Court's decision in *Adarand* added new complexities regarding the

constitutionality of the Commission's minority ownership preference policy, at a time when appropriations law prohibited the Commission from even thinking about modifying that policy. Last fall, the staff did present a recommendation to the Commission for action. As you know, shortly thereafter, Senator McCain, Chairman of the Senate Commerce Committee, requested that the Commission postpone action on this staff recommendation so that he could pursue legislation giving the Commission authority to auction this broadcast spectrum. The Commission acceded to Chairman McCain's request. Shortly thereafter, the court of appeals denied a petition for mandamus and indicated its expectation that action be taken concerning standards for choosing among competing broadcast applicants by early August. With that date now approaching, the Commission intends to turn soon to resolving the *Bechtel* remand proceeding.

I recognize that none of this alters the fact that Mr. Lee is affected by the aftermath of the court decision in *Bechtel* and the court decision taking away Orion's authorization to construct. I do hope, however, that this letter helps you better understand the basis for the Commission's decision. If you believe it would be helpful, I would be happy to arrange for staff from the Mass Media Bureau to brief you and your staff further on the background of this proceeding. Consistent with the Commission's *ex parte* rules, we would invite representatives of Orion and all the applicants comprising BFRI to attend the meeting.

Sincerely,

A handwritten signature in dark ink, appearing to be 'RH' with a long horizontal stroke extending to the right.

Reed E. Hundt
Chairman

Zeb Lee

Dear Friend,

OK. Give it to me straight. Tell me the truth.

I'm 86 years old. I'll take it like a man.

Is it fair?

That's all I want to know. Nothing more. Nothing less.

Just give me your "Yes" or "No" answer.

I've even enclosed an envelope to make it easy for you.

Here's the story...

The judge said of one of my opponents, "They lack the requisite character." He said they lied in their application. He described another applicant group as a minority ownership "sham."

And, of yet another applicant, the judge wrote that they had made "abjectly false representations" and that they "aren't basically qualified."

The F.C.C. judge commended me for my "splendid stewardship" in broadcasting.

That's one of the reasons he awarded me the license for a new FM radio station in Asheville, North Carolina in 1987.

But for the last 10 years, I've been forced to spend practically everything I have fighting off legal challenges from these same opponents.

Finally the FCC gave me the go-ahead to go on the air. But first they said I had to sell my existing AM station for a fraction of its worth. And I did as the F.C.C. ordered.

For nearly three years my wife Betty, sons Brian and Barry and I operated WZLS. We earned only praise from the local community.

Then out of the blue the FCC staff pressured me to sit down and cut a deal with my opponents - the same opponents the FCC Judge had denounced earlier!

When I refused to buy them off (some might call it blackmail) the FCC reversed its decision and awarded the Broadcast rights to my opponents.

Could it be because one of my opponent's partners is Melvin Watt, a Congressman whose group claimed minority preferences?

I could accept the loss if I had been defeated fair and square, but something stinks about this whole mess.

So I ask you again, is it fair?

If you think I have been treated fairly by the Clinton appointees in the FCC then check off YES on the enclosed reply form and mail it back to me.

Maybe my wife and two sons will feel better about it.

I'd be surprised if you or any other impartial observer thinks I've been treated fairly.

If you think I have been treated unfairly and unjustly then won't you please let me know.

It would help. It would really help.

Sometimes I feel like I'm out here all by myself. That nobody cares.

How can this happen in America? Is it fair? Is it right?

That's why your vote of confidence would mean so much to me and to my family.

During my more than 59 years in broadcasting I have always tried to play by the rules. And I have taught my sons to do the same thing.

I have always believed that justice will prevail.

My wife Betty and I and our two sons Brian and Barry operated our radio stations (first the AM and then the FM) as a public trust.

We care about what happens to our friends and neighbors.

I have personally announced over 4,000 high school football games and thousands of high school basketball games.

I've lived right here in Asheville for the last 59 years, trying to help out whenever I can.

But now, after more than 59 years in broadcasting I've been forced out of the radio business by federal bureaucrats.

Is it just because the FCC, led by Clinton appointees, think it's not "politically correct" to award an FM license to a family business?

Does the F.C.C. now support those applicants who request minority preferences over a family with 50 years of outstanding broadcast experience?

I don't know.

But I don't think it's fair.

And my opponents who promised "diversity" and "fresh air" are now providing "canned" computerized programming out of Florida.

There's no doubt in my mind but that they plan to "flip" the station and sell it to a big corporation for a huge profit.

The other applicants' representatives basically told us as much.

I think they don't care one whit about the Asheville community. I think they're just out to make a fast buck and they don't care if they cut ethical corners, use race, or behind the scenes politics to do it.

It stinks to high heaven.

But their plan has always been to keep dragging this out in order to bleed me dry financially and run out the clock on me.

They know I'm old and a man of limited means.

But this old man isn't finished yet!

I have never asked for help before because I have a lot of pride.

But now I'm up against a wall.

I still owe lease payments and bills on a station, which isn't even on the air!

And I am still fighting in Federal Court to gain justice.

Our faith in God gives us the strength to go forward every day.

But, I'm reaching the bottom of my financial barrel.

Now, no one in my family is working. I don't have a job and my wife and two sons no longer have jobs. They took away our livelihood.

Really, my only chance to get justice depends on you.

At the recommendation of friends I have established a Zeb Lee Justice Fund.

There is just no possible way that I can single handedly come up with the money to pay legal costs and to battle for justice.

And when this battle is over (even if it goes all the way to the U.S. Supreme Court), I'll shut this fund down.

But this case is important to me and to you.

My case certainly is not isolated. There's no doubt in my mind that countless other good applicants, perhaps in your hometown, have been discriminated against just because they weren't "politically correct."

Justice has been bent and twisted to accommodate the political objectives of self-serving politicians and their accomplices.

That's why I'm hoping you will help my family and me today with a contribution to the Zeb Lee Justice Fund.

Anything you contribute, no matter how large or small, will be greatly appreciated.

Sure it would be great if you could send \$1,000 or even more.

But, if you can't do that, I hope you will send something less, perhaps just \$20.

Believe me your \$20 will be used to help Betty and me and Brian and Barry see justice done.

We're on the ropes. So, as I said, anything you send will be greatly appreciated.

But hurry. We have a court date in September and the legal bills are mounting up fast. Thank you for hearing me out.

Sincerely,



Zeb Lee

P.S. I really want to know if you think the way I have been treated is fair. Just check off YES or NO and send it back to me today. And if you can, won't you please include a check to help in my legal battle with the FCC. I don't like to ask, but I can't fight back without your help. Please hurry! God bless you.

Was I Treated Fairly?

- **YES** Zeb, I think you were treated fairly. Don't be a crybaby.
- **NO** Zeb, I share your outrage! You and your family were treated shabbily and unjustly. I urge you to fight on for justice.
-

Here's How You Can Help...

- Zeb, I appreciate your integrity and I'll help you fight back. If we let them win this case no one will be safe. Here's my check for:

___\$1,000 (wow!) ___\$500 ___\$250 ___\$100
___\$75 ___\$50 ___\$30 ___\$20 \$_____Other

(Please make your check payable to: Zeb Lee Justice Fund
and return in enclosed envelope)

Name _____

Street Address _____

City & State _____ ZIP _____

Unfortunately contributions to the Zeb Lee Justice Fund
are not tax deductible.

Zeb Lee Justice Fund
780 Hendersonville Road
P.O. Box 15869
Asheville, NC 28813-0869



Federal Communications Commission
Washington, D.C. 20554

October 6, 1997

HAND DELIVERED

The Honorable Conrad Burns
Chairman, Subcommittee on Communications
Committee on Commerce, Science and
Transportation
United States Senate
227 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Burns:

Enclosed please find my responses to your post-hearing questions submitted on behalf of Senator Jesse Helms. I also enclose a copy of a letter to Senator Lauch Faircloth from FCC Chairman Reed E. Hundt which provides additional information about the proceeding which is the subject of Senator Helms' inquiries. The questions pertain to a proceeding which is "restricted" under the Federal Communications Commission's ex parte rules. Therefore, I am serving a copy of my responses to all parties to the proceeding. Please feel free to call me at 202-418-1700 if you have any questions.

Sincerely,

A handwritten signature in cursive script, reading "William E. Kennard", is written over a horizontal line.

William E. Kennard
General Counsel

Enclosures

**RESPONSES OF WILLIAM E. KENNARD TO POST-HEARING QUESTIONS
SUBMITTED BY SENATOR CONRAD BURNS
ON BEHALF OF SENATOR JESSE HELMS**

1. As you know, the recent budget legislation included a provision that appear[s] to require the FCC to apply auction procedures to pending applications for radio stations. These provisions were reportedly aimed at resolving the applications that have been in limbo since the Bechtel case struck down a part of the FCC's rules governing comparative license application proceedings. Please clearly state your views in response to the following questions:

a. In your opinion, is the FCC now required to apply these auction provisions to all pending application cases, or does the FCC have discretionary authority not to handle pending cases through this auction approach?

In the Balanced Budget Act of 1997, Congress required the FCC to use auctions to resolve all future comparative broadcast proceedings involving commercial stations. For pending applications, the statute states that the Commission "shall have the authority" to use auctions. The Conference Report states that this provision "requires" the Commission to use auctions for pending cases. The Commission will be determining in a rulemaking proceeding implementing the Balanced Budget Act of 1997 how it should proceed with these pending cases. The statutory language suggests that the Commission has discretion to use comparative proceedings for pending cases.

b. While most of the pending comparative cases had not gone through a hearing before an administrative law judge, and had at least an initial decision issued, a relatively small number of these cases had in fact been decided under the old rules by an ALJ and in some cases decisions made by the full Commission, although these decisions may have been on appeal. In those cases, the parties often had spent many years and hundreds of thousands of dollars to advance their applications under the old rules. Do you believe that it would be more equitable not to apply auction procedures to the cases which were far along in the process, where the applicants had played in good faith under the old rules, and to instead have those cases decided using any existing hearing record pursuant to such special rules as the Commission might adopt for deciding them?

I do believe that the Bechtel decision has caused unfairness to many applicants who have had further processing of their applications delayed and, as a result of that court decision, will necessarily have their applications processed under new procedures. I am quite sympathetic to their predicament. That is why the Commission argued to the court in Bechtel that the court's decision should only apply to new cases. Unfortunately the Commission was not successful and the court rejected this argument. As noted above, the issue of what those procedures will be, that is, whether some or all pending applications should be auctioned or decided pursuant to some new, yet-to-be developed criteria, will be a subject of the Commission's rulemaking proceeding implementing the Balanced Budget Act